

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



ORIGINAL **75-1004**

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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 75-1004**

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**UNITED STATES OF AMERICA,**

*against*

*Appellee,*

**ANTHONY M. NATELLI and JOSEPH SCANSAROLI,**  
*Defendants-Appellants.*

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**APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK  
(D.C. Crim. No. 74 Cr. 43)**

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**RESPONSE OF JOSEPH SCANSAROLI TO  
GOVERNMENT'S PETITION FOR REHEARING**

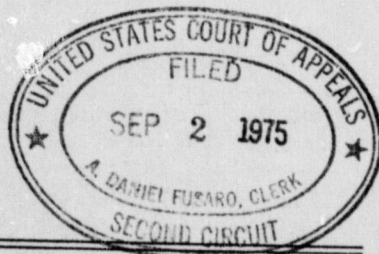
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**MORRISON, PAUL, STILLMAN & BEILEY**  
*Attorneys for Defendant-Appellant*  
*Joseph Scansaroli*  
110 East 59th Street  
New York, New York 10022  
(212) 593-0100

*Of Counsel:*

**CHARLES A. STILLMAN  
PETER H. MORRISON  
EDWARD D. TANENHAUS**

**Dated: New York, New York  
September 2, 1975**



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## REASONS FOR DENYING THE GOVERNMENT'S PETITION

Scansaroli was named in one count of a fourteen count indictment which charged that he, Natelli and four other defendants made two false and misleading statements in a proxy statement. The alleged misstatements were contained in a footnote to 1968 audited figures and in an unaudited nine months statement of earnings for the period ended May 31, 1969. This Court held that the two alleged specifications were premised upon "unrelated" evidence (Slip Op. 5191). As to one of these specifications—the nine months earnings statement—the Court found that there was insufficient evidence upon which to convict Scansaroli (Slip Op. 5184). Thus, because the jury "could have rejected the specification which the appellate court holds sufficiently proved [the footnote] and have convicted only on the specification held to be insufficiently proved [nine months unaudited statement]" (Slip Op. 5191), this Court reversed and remanded for a new trial as to Scansaroli on the footnote specification alone.

The government moves for rehearing because of what it describes as this Court's "perhaps unwitting departure" (Pet. 3) from existing law. The petition is ill-founded for two reasons: **First**, the government suggests that this Court has premised reversal of Scansaroli's conviction on a matter which was not brought to the trial court's attention. The government is wrong.

**Second**, the government's failure to challenge this Court's conclusion that it "would be sound practice to instruct the jury that they must be unanimous on a particular specification to convict" (Slip Op. 5191) when two factually unrelated specifications are charged in a single count and the evidence with respect to one is legally insufficient should end this inquiry. For although the government contends that the requested instruction would have made no difference (Pet. 2-3, 15), the government cannot escape the conclusion that without it, only guesswork could resolve the inherent ambiguity in the jury's verdict.

## ARGUMENT

**A conviction on a count containing two distinct specifications should be reversed where the proof of one specification is insufficient as a matter of law and where the defendant moved at trial for withdrawal of that specification from the jury's consideration.**

The government's petition proceeds on a simple theme: no motion was made to strike the second specification of Count 2—"the essence of which was the inclusion of the Eastern commitment" (Slip Op. 5191)—and therefore, Scansaroli cannot complain on appeal that the jury may have convicted him on that specification though this Court concluded that the evidence on that specification was insufficient to establish criminal conduct on his part. In other words, the government concedes that had a motion to strike been made, it would have no quarrel with this Court's conclusion.\* In fact—and contrary to the govern-

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\* The government claims that to warrant reversal of a conviction on a multi-specification count, the Court must find a constitutionally defective specification (Pet. 7-8). Although the Court need not reach this question, the Supreme Court has held that a conviction founded on insufficient evidence is violative of due process. *Anderson v. United States*, 417 U.S. 211, 223 n.12 (1974); *Gregory v. Chicago*, 394 U.S. 111, 112-13 (1969); *Thompson v. Louisville*, 362 U.S. 199, 206 (1960).

More to the point, the government fails to address this Court's decision in *United States v. Guterma*, 281 F.2d 742 (2d Cir.), *cert. denied*, 364 U.S. 871 (1960). Guterma, like Scansaroli, was prosecuted pursuant to 15 U.S.C. 78ff. A count of the indictment was also based upon two transactions. This Court (per Friendly, J.) found that defendant's requisite knowledge of one transaction was sufficient to support conviction but his knowledge of and connection with the other was not, and accordingly reversed:

[T]he two transactions were submitted to the jury together and we cannot know whether their verdict was based solely on the UFITEC transaction or in part or solely on the Judson Commercial sale. See *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 1959, 358 U.S. 613, 619, 79 S.Ct. 517, 3 L.Ed.2d 541. 281 F.2d 742 at 747.

See also *United States v. Cole*, 463 F.2d 163, 166 (2d Cir. 1972), *cert. denied*, 410 U.S. 492 (1973); *United States v. Driscoll*, 449 F.2d 894, 898 (1st Cir. 1971), *cert. denied*, 405 U.S. 920 (1972); *Vitello v. United States*, 425 F.2d 416, 419 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970) at Slip Op. 5189-90.

ment's assertion—a motion to strike the second specification was made.

At the end of the government's case, counsel for Natelli first proceeded to make his motions—which included a motion “to strike the allegations of paragraph 4 [of Count 2]” (the Eastern allegation) on the grounds of the insufficiency of the evidence (Tr. 1321-22). The motion was denied.

Counsel for Scansaroli then moved on behalf of his client. At the outset Judge Tyler advised counsel that he had “been sitting here” and that it was not necessary to “expatiate in detail” (Tr. 1335). After presenting an overview of why the evidence was insufficient, counsel then specifically moved to strike the evidence regarding the Eastern commitment (paragraph 4):

Mr. Stillman: Your Honor, at this time I would also like to move to strike the following evidence which your Honor received subject to connection.

The Court: I have already ruled that I am taking all that because I think there is sufficient connection.

Mr. Stillman: May I just for the record, your Honor, note the areas that I **specifically** have in mind and I will go through them very rapidly.

The Court: Sure.

\* \* \*

Mr. Stillman: **The affair of the Eastern Airlines, if your Honor please, which came out of the printer. I believe the evidence shows Scansaroli left the printer and did not participate in the entire matter with respect to the booking of Eastern and I move to strike that.** (Tr. 1338-39)\*

The motion was denied.

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\* Unless otherwise indicated in this response, all emphasis has been added.

It would be difficult to conceive of words which could place Scansaroli's position with respect to the Eastern commitment more squarely before the trial court. Can the government seriously argue that given the denial of this motion to strike the underlying evidence, further words would have served any purpose.\* Would the trial court have granted, or indeed, entertained a motion to "strike the specification" having already denied a motion to strike the "entire matter with respect to the booking of Eastern?" The answer is clearly "No."

It ill-behooves the government to now claim that this matter was not placed before the trial court. Put more specifically, a motion was made to strike "the entire matter with respect to the booking of Eastern" (Tr. 1339), and that motion was erroneously denied.

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\* The government relies heavily on *United States v. Mascuch*, 111 F. 2d 602 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940) and *United States v. Goldstein*, 168 F. 2d 666 (2d Cir. 1948). Those cases say that a broadside objection may not suffice to preserve for appeal the erroneous submission to the jury of an insufficient specification. As the record reveals, that is not the case here where the trial court's attention was narrowly focused not merely at "all of the evidence" nor just at "the entire indictment" but **specifically** at the Eastern commitment. In any event this Court has made clear that it is not the words of the objection but the substance that counts. *United States v. Rodriguez*, 465 F. 2d 5, 8-9 (2d Cir. 1972).

**CONCLUSION**

**The petition for rehearing should be denied.**

Respectfully submitted,

MORRISON, PAUL, STILLMAN & BEILEY  
*Attorneys for Defendant-Appellant*  
*Joseph Scansaroli*

*Of Counsel:*

CHARLES A. STILLMAN  
PETER H. MORRISON  
EDWARD D. TANENHAUS

New York, New York  
September 2, 1975

Due and timely service of Two copies  
of the within RESPONSE is hereby  
admitted this 2nd day of SEPTEMBER 1975

.....  
Attorney for APPELLANT

